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A

Malayan Banking Bhd v Perniagaan Sri Nuranuri Sdn Bhd & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–776 OF 2009

RAMLY ALI, ABDUL WAHAB PATAIL AND ANANTHAM KASINATHER JJCA

7 JULY 2014

C

Civil Procedure — Appeal — Decision of trial judge — Whether decision of trial judge fundamentally flawed — Bank claimed against borrower and guarantors for amount outstanding under overdraft facility — Defendants D *acknowledged they owed monies under facility but disputed amount claimed in action — Whether trial judge wrong to have dismissed bank's claim in toto — Whether issues raised by defendants did not credibly discredit bank's case — Whether trial court wrong to have allowed defendants' counterclaim*

E The High Court after full trial had dismissed the appellant's claim against the respondents for, inter alia, payment of RM307,808.86 owing as at 18 October 2002 with interest thereon at 3%pa above base lending rate or at such other rate imposed by the appellant and calculated on daily rests from 19 October 2002 till date of full settlement. The trial court had allowed the first F respondent's counterclaim for damages caused by the appellant's refusal to extend a bank guarantee it had issued on the first respondent's behalf in connection with the latter's contract with a third party. The appellant's claim related to overdraft facilities it had granted to the first respondent secured by guarantees executed by the second, third and fourth respondents as well as by G a pledge of fixed deposits. Following the first respondent's failure to service its current account, the appellant recalled the overdraft facility and liquidated RM425,000 in value of the fixed deposits to reduce the amount outstanding. The first respondent did not deny that it owed monies under the facility but only that the debt was not RM307,808.86 as at 18 October 2002. The first H respondent contended, inter alia, that the appellant did not, as instructed, liquidate all of the fixed deposits to minimise the amount outstanding and that the amount claimed was also incorrect for including interest calculated on daily rest basis instead of on monthly rests and at different rates to the imposition of which the first respondent was not given prior notice. It was also contended I that the appellant did not take into account two payments of RM10,000 each the first respondent had made. Agreeing with contentions of the first respondent, the trial court held that while it was undeniable that the company did owe the appellant monies under the overdraft facility, the appellant had failed to prove that the sum owing was RM307,808.86 as at 18 October 2002.

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Held:

(1) It was undisputed that the first respondent owed money to the appellant and that it remained unpaid; only the quantum remained to be determined. The trial court's dismissal of the appellant's claim in its entirety on the ground that it had failed to prove upon balance of probabilities the amount claimed was fundamentally flawed. The dismissal of a claim after full trial on the basis of a dispute on (a) the interest and (b) the utilisation of fixed deposits to reduce the amount outstanding would result in a plaintiff being denied remedy and a defaulting borrower profiting from his own default. By any measure, it was an unjust enrichment. If accepted as a matter of course, it would increase the risks of lending and therefore the cost of lending and interest rates would rise at the expense of good and bona fide borrowers. There could be no ground in law for exempting the first respondent from liability to repay the loan (see paras 8, 13 & 15).

(2) The issue of whether the interest was on daily, monthly or annual rests emerging much later amidst problems in repayment during an economic downturn was the classic afterthought to which no merit could be given and the trial court ought to have dismissed it from its consideration. Whether the interest rate was expressed to be on daily, monthly or annual rest was immaterial. It was the interest sum determined by calculation at such rate and rests to be payable that ultimately mattered. A borrower was duty-bound to act in his own interest and not rely on the lender to do so for him. There was no evidence adduced of contemporaneous complaint by the first respondent as to the way the interest was charged. It was happy to access the funds under the facility and it was reasonable to conclude the first respondent accepted the manner of calculation of the interest at that time (see para 19).

(3) The first respondent's defences were immaterial and did not have the effect of tipping the scales of balance of probabilities in its favour on the issues raised concerning the uncertainty in the amount claimed by the appellant. There was no evidence from the first respondent to credibly discredit the appellant's case and it was entitled to judgment as claimed (see para 26).

(4) The trial court erred in allowing the counterclaim holding that the appellant ought to have given the first respondent reasonable time before terminating the facility. However, under the facility agreement, the appellant had the right to recall/cancel the facility at any time it deemed fit without having to assign any reason therefor and the facility was repayable on demand. The agreement between the parties was not as to an on-demand facility simpliciter such as to invite the operation of the rule in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 (see paras 29, 31, 35 & 36).

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(5) There was no merit to the objection that the appellant failed to give notice of change of the interest rate. Section 5.02(c) of the facility agreement provided that the bank's failure to give such notice would not prejudice or invalidate such variation and the first respondent had agreed to that clause. The trial court erred in not dismissing the objection (see para 21).

(6) If it was true that the first respondent had made two payments of RM10,000 each to the appellant, it only had the effect of reducing the amount claimed by that amount but certainly could not justify the dismissal of the claim. The matter of these two payments emerged only in the re-examination of the second respondent and little weight could be given to it because he was himself uncertain about the payment. It was not right to deny the appellant of the RM20,000 based on the second respondent's testimony. If it was true that such payment was made, the respondents could file a separate action and prove that the payment was made on balance of probabilities (see para 22).

(7) It was not the first respondent's case that the fixed deposits would have settled all of the outstanding debt leaving the appellant with no cause of action; only that it would have reduced the amount of the debt. Disposal of security pledged to a lender was no longer in the hands of the borrower who pledged it and the decision as to when the security should be liquidated was in the lender's discretion. The appellant was therefore entitled not to follow the first respondent's directions as to disposal of the pledge (see paras 23 & 25).

(8) The court observed that it was a common error to refuse summary judgment on principal sum and interest because of a dispute whether the interest was at one rate and not another. In such a case, the actual dispute was not the principal and the interest, but the difference in the interest. It was that difference in the interest amount that needed to be tried and determined, and if a plaintiff failed, he failed only on that difference and not on the principal and other part of the original interest to which he was entitled to summary judgment (see para 14).

[Bahasa Malaysia summary

Mahkamah Tinggi selepas perbicaraan penuh telah menolak tuntutan perayu terhadap responden-responden untuk, antara lain, bayaran sebanyak RM307,808.86 yang terhutang pada 18 Oktober 2002 dengan faedah ke atasnya pada 3% setahun atas kadar pinjaman asas atau kadar lain yang dikenakan oleh perayu dan dikira atas kadar harian dari 19 Oktober 2002 sehingga tarikh penyelesaian penuh. Mahkamah perbicaraan telah membenarkan tuntutan balasan responden pertama untuk ganti rugi yang disebabkan oleh keengganan perayu untuk melanjutkan jaminan bank yang dikeluarkan bagi pihak responden pertama berkaitan kontrak responden

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pertama dengan pihak ketiga. Tuntutan perayu berhubung kemudahan overdarf yang diberikannya kepada responden pertama dijamin oleh jamin-jaminan yang dilaksanakan oleh responden-responden kedua, ketiga dan keempat dan juga jaminan oleh deposit tetap. Berikutan kegagalan responden pertama untuk membayar akaun semasanya, perayu menarik balik kemudahan overdraf dan mencairkan RM425,000 dalam nilai deposit tetap untuk mengurangkan jumlah yang belum dibayar. Responden pertama tidak menafikan bahawa ia berhutang wang di bawah kemudahan tetapi hanya hutang bukan RM307,808.86 pada 18 Oktober 2002. Responden pertama berhujah, antara lain, bahawa perayu tidak, seperti yang diarahkan, mencairkan kesemua deposit tetap untuk mengurangkan jumlah yang belum dibayar dan bahawa jumlah yang dituntut juga salah kerana memasukkan faedah yang dikira atas asas kadar harian sepatutnya atas kadar bulanan dan pada kadar berbeza kepada pengenaan di mana responden pertama tidak diberikan notis sebelumnya. Ia juga dihujahkan bahawa perayu tidak mengira dua bayaran sebanyak setiap RM10,000 yang dibuat oleh responden pertama. Bersetuju dengan hujahan responden pertama, mahkamah perbicaraan memutuskan bahawa sementara adalah tidak dinafikan bahawa syarikat memang berhutang wang dengan perayu di bawah kemudahan overdraf, perayu telah gagal untuk membuktikan jumlah wang yang dihutang adalah sebanyak RM307,808.86 pada 18 Oktober 2002.

Diputuskan:

(1) Adalah tidak dipertikaikan bahawa respoden pertama berhutang wang kepada perayu dan bahawa ia kekal tidak dibayar; hanya kuantum kekal untuk ditentukan. Penolakan mahkamah perbicaraan terhadap tuntutan perayu dalam keseluruhannya atas alasan bahawa ia gagal untuk membuktikan atas imbangan kebarangkalian jumlah yang dituntut adalah secara asasnya cacat. Penolakan tuntutan selepas perbicaraan penuh atas asas pertikaian atas (a) faedah dan (b) penggunaan deposit tetap untuk mengurangkan jumlah yang belum dibayar akan mengakibatkan plaintif dinafikan remedi dan peminjam yang mengingkari mendapat keuntungan daripada keingkarannya sendiri. Walau bagaimanapun, ia adalah pengkayaan tak adil. Jika diterima sebagai perkara yang tentu, ia akan menambahkan risiko peminjaman dan oleh itu kos peminjaman dan kadar faedah meningkat dan akan mengakibatkan kemudaratan kepada peminjam-peminjam baik dan suci hati. Tidak akan terdapat alasan dari segi undang-undang untuk mengecualikan responden pertama daripada liabiliti untuk membayar pinjaman tersebut (lihat perenggan 8, 13 & 15).

(2) Isu sama ada faedah adalah atas kadar harian, bulanan atau tahunan muncul pada kemudiannya ditengah-tengah masalah dalam pembayaran semasa kemelesetan ekonomi adalah sesuatu yang difikirkan kemudian yang klasik di mana tiada merit boleh diberikan dan mahkamah

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perbicaraan patut menolaknya daripada pertimbangannya. Sama ada kadar faedah dinyatakan atas kadar harian, bulanan atau tahunan adalah tidak material. Ia adalah jumlah faedah yang ditentukan dengan pengiraan pada kadar sedemikian yang boleh dibayar adalah penting. Peminjam adalah bertanggungjawab untuk bertindak untuk kepentingannya dan bukan bergantung ke atas pemberi pinjaman untuk berbuat sedemikian untuknya. Tidak terdapat keterangan yang dikemukakan mengenai aduan semasa oleh responden pertama terhadap bagaiman faedah dikenakan. Ia gembira dapat menggunakan wang di bawah kemudahan dan ia adalah munasabah untuk memutuskan responden pertama menerima cara pengiraan faedah pada masa tersebut (lihat perenggan 19).

(3) Pembelaan responden pertama adalah tidak penting dan tidak mempunyai kesan memberi kelebihan imbangan kebarangkalian memihaknya atas isu yang dibangkitkan berkaitan ketidakpastian dalam jumlah yang dituntut oleh perayu. Tidak terdapat keterangan daripada responden pertama untuk tidak mempercayai kes perayu dan ia berhak kepada penghakiman seperti yang dituntut (lihat perenggan 26).

(4) Mahkamah perbicaraan tersilap dalam membenarkan tuntutan balas dengan memutuskan bahawa perayu patut memberi kepada responden pertama masa yang munasabah sebelum menamatkan kemudahan tersebut. Walau bagaimanapun, di bawah perjanjian kemudahan, perayu mempunyai hak untuk menarik balik/membatalkan kemudahan tersebut pada bila-bila masa ia dianggap wajar tanpa memberikan apa-apa alasan kepadanya dan kemudahan boleh dibayar balik atas tuntutan. Perjanjian di antara pihak-pihak bukan terhadap kemudahan permintaan *simpliciter* seperti untuk memohon operasi peraturan dalam kes *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 (lihat perenggan 29, 31, 35 & 36).

(5) Tidak terdapat merit kepada bantahan bahawa perayu gagal untuk memberi notis pertukaran kadar faedah. Seksyen 5.02(c) perjanjian kemudahan memperuntukkan bahawa kegagalan bank untuk memberi notis sedemikian tidak akan memprejudis atau mentaksahkan pelbagaian tersebut dan responden pertama telah bersetuju kepada klausa tersebut. Hakim perbicaraan tersilap dalam tidak menolak bantahan tersebut (lihat perenggan 21).

(6) Jika ia adalah benar bahawa responden pertama membuat dua bayaran sebanyak setiap RM10,000 kepada perayu, ia hanya mempunyai kesan mengurangkan jumlah yang dituntut dengan jumlah tersebut tetapi pasti tidak dapat menjustifikasikan penolakan tuntutan tersebut. Perkara mengenai kedua-dua bayaran muncul hanya dalam pemeriksaan semula responden kedua dan sedikit perhatian boleh diberikan kepadanya kerana dia sendiri tidak pasti mengenai bayaran tersebut. Ia tidak betul

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untuk menafikan perayu terhadap RM20,000 tersebut berdasarkan atas keterangan responden kedua. Jika ia adalah betul bayaran sedemikian dibuat, responden-responden boleh memfailkan tindakan berasingan dan membuktikan bahawa bayaran dibuat atas imbangan kebarangkalian (lihat perenggan 22).

(7) Bukan kes responden pertama bahawa deposit tetap akan menyelesaikan kesemua hutang yang belum bayar meninggalkan perayu tanpa kausa tindakan; hanya ia akan mengurangkan jumlah hutang. Pelepasan jaminan yang dijamin kepada pemberi pinjaman bukan lagi di tangan peminjam yang menjaminnya dan keputusan terhadap bila jaminan patut dicairkan adalah budi bicara pemberi pinjaman. Perayu oleh itu berhak tidak mengikut arahan responden pertama terhadap pelepasan jaminan tersebut (lihat perenggan 23 & 25).

(8) Mahkamah mematuhi bahawa ia adalah kesilapan biasa untuk menolak penghakiman ringkas atas jumlah utama dan faedah kerana pertikaian sama ada faedah pada satu kadar dan bukan yang satu lagi. Dalam kes sedemikian, pertikaian sebenar bukan jumlah utama dan faedah, tetapi perbezaan dalam faedah. Adalah perbezaan dalam jumlah faedah yang perlu dibicarakan dan ditentukan, dan jika plaintif gagal, dia gagal hanya atas perbezaan tersebut dan bukan atas jumlah utama dan bahagian lain faedah asal di mana dia berhak kepada penghakiman ringkas (lihat perenggan 14).]

Notes

For cases on decision of trial court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1055–1059.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76; [1993] 2 CLJ 495, SC (refd)
Joachimson v Swiss Bank Corp [1921] 3 KB 110, CA (refd)
United Malayan Banking Corp Bhd v Chen Yin Khee & Ors [2005] 2 MLJ 118; [2004] 4 CLJ 385, CA (distd)

Appeal from: Civil Suit No MT(2) 22–15 of 2003 (High Court, Kuantan)

Wan Azman bin Wan Ahmad (Lua & Mansor) for the appellant.
R Sarengapani (RS Pani & Assoc) for the respondents.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant/plaintiff Malayan Banking Bhd ('the appellant bank') had filed suit against the Perniagaan Nuranuri Sdn Bhd ('the first respondent'), as the borrower and its three guarantors ('the respondents') for breach of contract

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in respect of repayment of overdraft facilities extended to the first respondent, and sought orders as follows:

(a) payment of the sum of RM307,808.86 as at 18 October 2002;

(b) interest thereon at the rate of 3%pa above BLR or at such rate applicable by the appellant from time to time calculated on daily basis from 19 October 2002 to the date of full settlement;

(c) litigation costs to be assessed;

(d) costs; and

(e) such other reliefs as the court thinks fit.

[2] After a full trial, the High Court dismissed the appellant bank's claim and allowed the first respondent's counterclaim. At para 4 of the grounds of judgment, the High Court stated:

> [4] KEPUTUSAN MAHKAMAH
>
> Saya telah menimbang keterangan saksi-saksi, dokumen-dokumen gang dikemukakan dan hujahan bertulis kedua-dua pihak dan atas imbangan kebarangkalian, saya mendapati plaintif telah gagal mematuhi syarat-syarat dalam Surat Tawaran dan dokumen sekuriti gang dilaksanakan dan telah gagal membuktikan jumlah tuntutannya. Oleh yang demikian tuntutan plaintif ditolak dengan kos. Bagi tuntutan balas defendan, mahkamah mendapati defendan telah berjaya membuktikan tuntutan balasnya dan oleh itu tuntutan balas defendan di perenggan (b), (c) dan (d) dibenarkan dengan gantirugi am ditaksirkan dihadapan pendaftar dengan kos. Alasan saya membuat keputusan adalah seperti berikut:...

[3] Having heard the parties, this court had allowed the appeal, set aside the order of the High Court as to dismissal of the claim, entered judgment for the appellant bank as claimed in the writ of summons, set aside the order on the counterclaim, ordered the sum paid by the appellant be refunded within 30 days, fixed costs in the sum of RM10,000 and ordered that the deposit be refunded.

THE HIGH COURT

[4] The High Court had summed up the principal submissions before it as follows:

(a) the appellant had claimed that:

(i) the first respondent failed to service its current account No 006098209051 and the appellant on 9 November 2001 had withdrawn the facility and liquidated fixed deposits totalling RM425,000 to reduce the amount outstanding;

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(ii) the notices as to outstanding amounts are at P12 (pp 69–86); and

(iii) the first respondent had not denied it owed money to the appellant, but it denied it was RM307,808.86 as at 18 October 2002.

(b) in denying that it owed RM307,808.86 as at 18 October 2002, the first respondent alleged that:

(i) the appellant did not liquidate all of the fixed deposits;

(ii) the interest was not credited into the current account to show how much of the fixed deposits had been liquidated;

(iii) the appellant had therefore failed to prove the true and accurate amount due and to take steps to minimise the amount outstanding; and

(iv) the amount claimed is incorrect as it included interest that had not been agreed to, or not notified to the first respondent.

[5] At para (4.2) of its grounds of judgment, the High Court held that:

> 4.2 ... Berdasarkan pada dokumen dan keterangan saksi adalah tidak dinafikan bahawa defendan pertama sememangnya berhutang dengan plaintif akan bayaran lebihan oberdraf yang masih terhutang tetapi defendan pertama menafikan bahawa jumlah yang dituntut oleh plaintif iaitu RM307,808.86 setakat 18 Oktober 2002 di ms 87 (P57). ...

[6] The High Court dismissed the claim upon the following reasoning:

(a) the respondents were charged upon a daily rate even though:

(i) the letters of offer of 3 October 1997 and 8 December 1997 and the facilities agreement did not so state;

(ii) the letter of guarantee of 24 December 1997 mentioned the interest on monthly rests;

(iii) appellant bank's letter of 12 May 2001 stated it to be monthly; and

(iv) SP2 told the court it was monthly.

(b) though it was agreed that the interest rate could be varied by the appellant, the respondents were not given notice of such changes;

(c) the sum overdrawn on the overdraft account as at 15 November 2002 was RM21,517.43, and SP2 did not deny the assertion that two payments of RM10,000 was made by the first respondent and that these payments were not reflected in the accounts as having been taken into account;

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(d) SD 1 had not agreed as to the outstanding amount and had asked the appellant to liquidate the fixed deposits pledged and to account for the proceeds; and

(e) the appellant bank had not produced evidence of the amount RM307,808.86 claimed as owed by the first respondent (*United Malayan Banking Corp Bhd v Chen Yin Khee & Ors* [2005] 2 MLJ 118; [2004] 4 CLJ 385 (CA))

[7] The High Court allowed the counterclaim on the following grounds:

(a) the appellant bank's refusal to extend the bank guarantee resulted in the respondent suffering loss and damages as it had to find another bank to continue its business;

(b) the appellant bank knew of the first respondent's contract with Telekom Malaysia Bhd; and

(c) The appellant bank ought to have given reasonable time: *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495 (SC).

BEFORE THIS COURT

[8] Our first observation is that on the issue of liability, it was not disputed that the first respondent owed money to the appellant bank and that it remained unpaid, only the quantum remained to be determined. The High Court correctly found that the appellant bank had established its case and the issue that remained was to determine the quantum payable. We do not need, therefore, to traverse the grounds as to whether the first respondent owed any outstanding sum.

[9] The submissions for the appellant bank, referring to grounds of appeal, the evidence both oral of witnesses examined and cross-examined in the High Court, and documentary of documents produced and exhibited in the High Court, addressed the following:

(a) the undisputed fact that the appellant had granted an overdraft and bank guarantee facility, and that funds had been extended to the first respondent, and that there was sum outstanding; and

(b) the disputed facts that it was the appellant who had breached the terms of their agreement and that the respondent had suffered loss.

[10] The submissions for the respondents set out the background and proceeded to address the following as issues:

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(a) interest on daily rests instead of monthly rests, knowledge of the appellant that the first respondent had ongoing projects with Telekom;

(b) that the overdraft account was overdrawn and in excess in 1999, yet the respondent was allowed to operate the account;

(c) that the first respondent had requested for rescheduling of payments; and

(d) that notification was given to the appellant to uplift various fixed deposit receipts pledged with the appellant so as to reduce the amount outstanding.

[11] It was submitted for the respondents that the appellant did not reply and uplifted only on some of the fixed deposit receipts but there were three, amounting to RM111,550, that were not pending receipt of the original copies of the bank guarantees.

FINDINGS AND CONCLUSION

[12] Ordinarily, where the issue is of quantum, then depending upon the evidence as to quantum and the defences thereon:

(a) judgment could be entered on the sum as claimed; or

(b) judgment could be entered on the amounts not disputed and/or found as proved; and

(c) directions given for assessment of the amounts on the disputed parts before the deputy registrar.

[13] The dismissal of the claim amount in entirety on the grounds of failure to prove upon a balance of probabilities the amount as claimed is, in our view, an approach that is fundamentally flawed. It is the amount a plaintiff is unable to prove that is not allowed, but that part of the amount that he is able to prove or is not disputed must be allowed. To dismiss the judgment on what a plaintiff is able to prove or is not disputed is contrary to the plaintiff's rights to its property.

[14] We observe it is a common error to refuse summary judgment on principal sum and interest because of a dispute whether the interest rate was at one rate and not another. In such a case, the actual dispute is not the principal and the interest, but the difference in the interest. It is that difference in the interest amount that needs to be tried and determined, and if a plaintiff fails, he fails only on that difference, and not on the principal and other part of the original interest, to which he is entitled summary judgment.

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[15] In this case, the error went one step further. While in a refusal of summary judgment the claim can proceed to a trial, a dismissal of the claim after full trial on the basis of a dispute on (a) the interest and (b) the utilisation of fixed deposit in reducing the amount outstanding, results in a plaintiff being denied remedy and a defaulting borrower profiting from his own default. By any measure it is an unjust enrichment. If accepted as a matter of course, it increases the risks of lending and therefore the cost of lending. Interest would be increased and it is at the expense of good and bona fide borrowers. There can be no ground in law for exempting the first respondent from liability to repay the loan *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495 (SC).

[16] Reliance was placed by the High Court upon a decision of the Court of Appeal in *United Malayan Banking Corp Bhd v Chen Yin Khee & Ors* where Normah Yaakob J (as she then was) held:

> As this is a money claim based on accounts kept by the appellant, particulars of which are strenuously disputed by the respondents it is of utmost importance that the appellant produce all the accounts to establish the respondent's liabilities. This is more so when the amount claimed in the statement of claim is for RM248,377.65 as at 13 August 1987, but at the date of trial, the amount had arisen to RM804,255.82 and SP1 had not explained how the initial claim had accumulated to more than sevenfold. If the accumulation was as a result of overdue interest the amount of such overdue interest should have been stated and proven by way of the appellant's accounts. This was not done, and the sum of RM804,255.82 has not been substantiated. See the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635.
>
> Added to this is the absence of evidence as to the utilization of the proceeds of sale of the charged property. This is a very relevant piece of evidence for if such proceeds had been utilized to offset the company's liability for the second fixed loan, it would surely affect the respondents' liabilities under the guarantee and indemnity.

[17] In our view, that case is distinguishable. It involved two loans, and the appellant bank therein was suing on the second facility. There was no certificate of indebtedness. The land charged as security had been sold by public auction, but there was no evidence to show whether the proceeds of sale had been utilised to offset the amounts due from either of the two loans. Unlike in the instant case before us where it is not disputed there was sum outstanding, and the issue is only as to the amount, the facts in that case was that the appellant bank had failed to show if there was any sum outstanding, let alone how much.

[18] The failure to prove the sum claimed in this case was firstly ascribed to a dispute on the interest rests.

[19] Upon consideration, it is our view that whether the interest rate is

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expressed to be on a daily, monthly or annual rest is immaterial. Whether the interest rate is expressed to be on a daily rest or any other rest, it is the interest sum determined by calculation at such rate and rests to be payable that ultimately matters. The only consequence of a daily rest is a compounding effect such that the effective interest rate is higher than the rate stated. The same effect may be obtained by an increase to an interest rate. A borrower is duty bound to act in his own interest and not rely on the lender to do so for him. There is no evidence adduced of contamporaneous complaint as to the way the interest was charged. The first respondent was happy to access the funds under the facility. It is reasonable to conclude that the first respondent accepted the manner of calculation of the interest at that time. We conclude that the issue of whether it was daily, monthly or annual rest, emerging much later amidst problems in repayment during an economic downturn is the classic afterthought to which no merit can be given, and the High Court ought to have dismissed it from its consideration.

[20] The second reason given was that there was change of interest rate and notice was given. The High Court held:

(a) there was no evidence that notices had been given of changes in interest rates;

(b) SP2 admitted that interest was monthly and not on daily basis; and

(c) the appellant bank's letter of 12 May 2001 showed the intent that interest be on monthly basis.

[21] The subject of variation of interest rate is provided for in section 5.02 of the facility agreement dated 24 December 1997. While it was provided the appellant bank shall give notice of change of interest rate, it was not brought out by the first respondent that section 5.02(c) also provides that 'but failure by the bank to give notice shall not prejudice or have the effect of invalidating any such variation. ...'. The failure to do so renders the submissions to be misleading and hence lacking in bona fides. In our view, since it was agreed by the first respondent that failure to give notice of change of interest rate would have the effect of invalidating the change, there is no merit on this ground of objection and the High Court ought to have dismissed it. In failing to do so, the High Court erred.

[22] A third reason affecting proof of the sum of RM307,808.86 claimed to be due as at 18 October 2002 was that the sum overdrawn on the overdraft account as at 15 November 2002 was RM21,517.43, and SP2 did not deny the assertion that two payments of RM10,000 was made by the first respondent and that these payments were not reflected in the accounts as having been taken into account. If this is correct, it has the effect of reducing the claimed amount by RM20,000 but certainly cannot justify the dismissal of the claimed amount

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of RM307,808.86 as it did not settle the amount due upon default even with the liquidation of the fixed deposits pledged as security. Observing that the fact these two payments had been made was not pleaded in the statement of defence. It emerged in the re-examination of the second respondent Encik Abu Bakar bin P C Kuaya ('SD1'). Little weight can be given to it because to his own counsel's question 'Berapa ansuran di bayar?', he could only reply 'Kalau tak silap 2 kali.' We do not think it right to deny the appellant bank RM20,000 on the basis of testimony SD1 himself is uncertain about. If indeed it is true that such payment had been made, the respondents should file a separate action and prove payment of the RM20,000 upon a balance of probabilities.

[23] A fourth reason was as to the utilisation of fixed deposits to reduce the amount outstanding. Again it was not the case for the first respondent that the fixed deposits would have settled all of the outstanding debt leaving the appellant bank with no cause of action, but that it would reduce the amount.

[24] As to determination of the amount outstanding, the first respondent relied upon the fact that the overdraft account was overdrawn and in excess in 1999, but the appellant bank allowed the first respondent to operate the account. The first respondent had requested the appellant bank to reschedule payment and further notified them to uplift the various fixed deposit receipts pledged with the appellant bank to reduce the amount payable since May 2000 and requested for copies of FD receipts and statements to be furnished to them.

[25] That the appellant bank had allowed the account to be overdrawn in 1999 is, in our view, overtaken by events when the first respondent sought agreement to reschedule the payments on the account. However, it is not the law that the first respondent is entitled to a rescheduling of its payments. Nor is there provision in the agreement between the parties that the first respondent entitled to reschedule its payments. On the contrary, it is provided by section 9.04 that any indulgence shall not in any way affect the security provided, and by section 9.07 the remedies are cumulative and not exclusive, and not exclusive of any other remedies provided by law. Further, it is trite that disposal of security pledged to a lender is no longer in the hands of the borrower who pledged it. When the security is to be liquidated it is the discretion of the lender. Section 8.05 reserved to the appellant bank its all or any of its rights to remedies concurrently. That the appellant bank had not followed the first respondent's directions as to disposal is in the circumstances therefore not something the appellant bank is not entitled to do.

[26] The nett result is that the defences of the first respondent are immaterial and does not have the effect of tipping the scales of the balance of probabilities against the appellant bank in favour of the first respondent upon the issues of uncertainty of amount as raised. Though there was arguable basis to launch the

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issues, there was no evidence from the first respondent to credibly discredit the case for the appellant bank. The appellant bank is, therefore, entitled to judgement as claimed.

THE COUNTERCLAIM

[27] The case for the counterclaim is that the appellant bank knew of the first respondent's contract with Telekom Malaysia Bhd, that it required a bank guarantee which the appellant bank had provided before, and its refusal to extend the bank guarantee resulted in the respondents suffering loss and damages as it had to find another bank to continue its business. The first respondent had relied upon *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors.*

[28] We observe that the Supreme Court, in *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors*, held that the dismissal of the bank's counterclaim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the bank was in breach of contract in recalling the overdraft prematurely cannot be justified since the bank's claim for recovery of the loan was an entirely separate matter from the first respondent's claim for damages against the bank, and that there is no ground in law for exempting the first respondent from liability to repay the loan.

[29] Relying on *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors*, the High Court, in the instant appeal, held that the appellant bank ought to have given the first respondent reasonable time before terminating the facility. On the question of determination of the reasonable time, the Supreme Court had adopted the words of Linden J in *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 in holding that if a banker wants to close his customer's account he must give that customer reasonable notice:

> ... Linden J recognized that the bank concerned was obliged to give the debtor some reasonable time to repay the loan even though the loan was a demand loan. He went on to hold that in assessing what length of time was reasonable in a particular fact situation various factors must be analysed, namely:
>
> (a) The amount of the loan;
>
> (b) The risk to the creditor of losing his money or the security;
>
> (c) The length of the relationship between the creditor and the debtor;
>
> (d) The character and reputation of the debtor;
>
> (e) The potential ability of the debtor to raise the money required in a short period;
>
> (f) The circumstances surrounding the demand for payment; and

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(g) Any other relevant factors

[30] The High Court held:

> ... Berdasarkan kes di atas, pihak plaintif seharusnya dibawah hak-hak kontrak mempertimbangkan faktor-faktor di atas sebelum menamatkan perjanjian tersebut dan bukan semata-mata disebabkan akuan defendan pertama yang gagal dikawal selia. Pihak defendan pertama di sini telah mengalami kerugian yang tidak boleh dipampas akibat keputusan yang di ambil oleh Plaintif tanpa pertimbangan sewajarnya. Oleh demikian, soya membenarkan tuntutan balas defendan pertama bagi gantirugi am kemungkiran perjanjian pinjaman serta faedah dan kos gantirugi yang akan ditaksirkan oleh mahkamah.

[31] A difficulty in *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* is that it was disputed whether the facility was an 'on demand' facility. In this case, it is clear from the section on 'REPAYMENT' in the letter of offer 3 October 1997 that the facility was on demand:

> However, the bank reserves the right to recall/cancel the facilities at any time it deems fit without assigning any reason thereto and is repayable on demand.

[32] In this case, by section 4.05 of the facility agreement of 24 December 1997, it is provided that:

> Section 4.05: No obligation to make Further Advances Nothing herein contained shall be deemed to render it obligatory upon the bank either at law or equity to make or continue to make Advances or to afford any other accommodation or facilities whatsoever.

[33] Section 6.01 provided as to repayment of the facility:

> Without prejudice to Section 8.02, the Facility may be subject to such periodical review as the bank deems fit and the bank reserves the right to recall the Facility at any time as the bank deems fit without having to assign any reason whatsoever.

[34] Section 6.01 is thus specifically not conditional upon any event of default under section 8.01 and action being taken under section 8.02 therefor.

[35] In our view, the agreement between the parties is not as to an on demand facility simpliciter such as to invite the operation of the rule in *Joachimson v Swiss Bank Corp*. By section 4.05 of the agreement, the rule in *Joachimson v Swiss Bank Corp* is clearly excluded. This conclusion is strengthened section 6.02 is taken into consideration.

[36] For the foregoing reasons, the High Court erred in allowing the counterclaim.

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[37] Accordingly, we made the order described at para (3) above.

Order accordingly.

Reported by Ashok Kumar